Supreme Court, U.S.
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No.

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1996

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TERRIL FLANAGAN, - - - - - *Petitioner*

*versus*

DAVID J. CAZALET,
ED CAHILL, and
RUSSELL COUNTY NEWSPAPERS,
INC., as *The Times Journal*, - - *Respondents*

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## PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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ROBERT L. BERTRAM
BERTRAM & WILSON
One Monument Square
Jamestown, Kentucky 42629
(502) 343-3101
*Counsel for Petitioner*

September 10, 1996

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

## QUESTION PRESENTED

Whether a reviewing court may limit the number of possible findings that a jury may have reached in their determination of constitutional malice in a public figure defamation case.

## PARTIES TO THE PROCEEDING

All the parties to the within proceeding before the Court whose judgment is sought to be reviewed are named in the caption to this Petition as filed in this Court.

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The petitioner, Terril Flanagan, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Kentucky Court of Appeals, entered in the above-entitled proceeding on November 3, 1995. The final and appealable order, denying the Petitioner's Motion for Discretionary Review, was entered on June 12, 1996.

## OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is reprinted in the appendix hereto, (p. 1a, *infra.)*

The order of the Supreme Court of Kentucky denying the petitioner's motion for discretionary review and ordering the opinion of the Court of Appeals not to be published

is unreported. It is reprinted in the appendix hereto, p. 12a, *infra*.

## JURISDICTION

The jurisdiction of this Court to review the judgment and opinion of the Kentucky Court of Appeals is invoked under 28 U.S.C. 1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution require, in public figure defamation cases, independent appellate review of the whole record. *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

The First Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution neither provide for nor acknowledge an absolute privilege for the expression of opinion. *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1 (1990).

## STATEMENT

On May 22, 1993, the petitioner, Terril Flanagan, the incumbent County Judge-Executive of Russell County Kentucky, brought an action for defamation against the respondents, Russell County Newspapers, Inc., doing business as the *Times Journal*, its publisher and editor, David J. Cazalet and its managing editor, Ed Cahill. Petitioner's action was predicated upon errors of fact published by the respondents in a series of editorials in the *Times Journal*. These articles contained numerous factual errors and omissions. The complaint alleged, and the jury found from the evidence presented by both parties, that the three editorials were substantially incorrect and were published with the respondents' knowledge that the facts contained in the publication were false. The jury found that the respondents had maliciously published false facts that related to

the petitioner's conduct of the public office he held. The Kentucky Court of Appeals, pursuant to their independent review of the case, held that the record failed to support the jury's finding that the respondents' publications were false and defamatory and entered an opinion reversing the trial court. A timely Motion for Discretionary Review to the Supreme Court of Kentucky was filed by the petitioner. The Supreme Court of Kentucky denied the Motion, ordering the opinion of the Court of Appeals not to be published. Comes now the petitioner to this Court praying that a writ of certiorari issue.

## PROCEEDINGS BELOW

The Kentucky Court of Appeals conducted an independent review of the record and held that, based upon the evidence presented at trial, the record did not support the jury's finding that the editorials contained false and defamatory statements. (App., *infra.*, 10a) Having held that the editorials were not, as a matter of law, false and defamatory, the Court held that it was unnecessary to consider whether Flanagan successfully proved the additional elements of a defamation case and refused to consider the issues of malice or special damages. (App., *infra.*, 11a)

The reviewing Court considered each of the three editorials separately in reaching its opinion. This tripartite analysis was preceded by a general discussion of the applicable law. Following *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), the RESTATEMENT (SECOND) OF TORTS (1977) and *Ball* v. *E.W. Scripps Co.*, 801 S.W. 2d 684 (Ky. 1990), *cert. denied*, 499 U.S. 976, the Court held:

> We have a duty to conduct an independent examination of the whole record...to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression. *New York Times*, 376 U.S. at 285. (App., *infra.*, 2a)

> When the question revolves around the underlying facts as opposed to the issue of actual malice appellate review must still be in terms of what the jury could find as true facts and what the jury could reasonably infer from the testimony of the witnesses when considered as a whole. *Ball*, 801 S.W. 2d at 688, citing *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989). (App., *infra.*, 2a)

The Court found that the petitioner was a public official and, in a series of annotations, discussed the Kentucky law of libel relative to public figure defamation cases. Prefacing their analysis with insightful *dictum* by the Kentucky Supreme Court opined, "[i]n the parlance of the horse industry, part of the turf of being a public official ...is to be subject to public scrutiny." *McCall* v. *Louisville Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 886, (Ky. 1981) , *cert. denied*, 456 U.S. 975 (1982). (App., *infra.*, 3a, n.3) Sequentially, the Court noted the Kentucky law and authority concerning public figure defamation; the first two comments addressed the jurisdiction's law of truth and opinion:

> One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true. RESTATEMENT (SECOND) OF TORTS, sec. 581A (1977). Truth is a complete defense to a libel action in Kentucky. (App., *infra.*, 3a, n.4)
>
> A publication need only be substantially true. *Bell v. Louisville Courier-Journal & Louisville Times Co.*, 402 S.W. 2d 84 (Ky. 1966); *Pearce* v. *Courier-Journal & Louisville Times Co. & Louisville Times Co.*, 683 S.W.2d 633 (Ky. App. 1985). (App., *infra.*, 3a, n.4)

The Court then defined defamatory communication:

> A communication is defamatory if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. RESTATE-

> MENT (SECOND) OF TORTS, sec. 559 (1977). (App., *infra.*, 3a, n.5)

The Court then set out the issues for the judge and the issues for the jury:

> It is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may be reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct, and the function of the jury to determine whether that meaning was attributed to it by the recipient of the communication. RESTATEMENT (SECOND) OF TORTS, sec. 566 cmt. c. (App., *infra.*, 3a, n.5)

Concluding its analysis, the Court cited the controlling law concerning the expression of opinion:

> A simple expression of opinion based on disclosed or nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. RESTATEMENT (SECOND) OF TORTS, sec. 566 cmt. c. (App., *infra.*, 3a, n.6)
>
> [P]ure opinion (opinion based on disclosed or nondefamatory facts) is absolutely privileged. *Yancey*, 786 S.W.2d at 857. (App., *infra.*, 4a, n.6)
>
> A defamatory communication may consist of a statement of opinion, but a statement of this nature is actionable only if it implies the allegation of assumed nondefamatory facts as the basis for the opinion. *Yancey* v. *Hamilton*, 786 S.W. 2d 854, 857 (Ky. 1989) (quoting RESTATEMENT (SECOND) OF TORTS, sec. 566 (1977). (App., *infra.*, 4a, n.7)

Based on these legal predicates, the Court of Appeals made findings of fact and conclusions of law concerning each editorial.

The publication of March 26, 1992 stated, *inter alia*:

"A DO-IT-YOURSELF BUDGET"

> County Judge-Executive Terril Flanagan has washed his hands of the county budget. Flanagan presented his proposal which is at least $250,000 over being balanced to the magistrates...Basically he's turned his back on the magistrates again because they wouldn't do what he wanted them to do. He's said to them, "do it yourself."

Following the Kentucky Supreme Court's direction in *McCall*, the reviewing Court reiterated that "defamatory matter must be considered as a whole." *McCall*, 623 S.W. 2d at 884. The Court further held that defamatory words must be measured by their natural and probable effect on the mind of the average lay reader. *Id.* The Court noted that the articles were published in the editorial section of the *Times Journal*, concluding that the average lay reader would "undoubtedly" interpret the statements as the opinion of the author. (App., *infra.*, 6a). Applying the rule of *Yancey* (following the Restatement), the Court held that the language was a "simple expression of opinion" based on disclosed and assumed nondefamatory facts and therefore not actionable, "no matter how unjustified and unreasonable...or how derogatory." (App., *infra.*, 6a) The Court determined from its review of the record that the editorial was based on "allegedly" well known disclosed facts regarding the proposed county budget. (App., *infra.* 6a)

Addressing the respondents' statement that the budget was "$250,000 over being balanced", the Court found that the publication was substantially true and that substantial truth equates to absolute truth and "truth is a complete defense to defamation claims in Kentucky." *Bell*, 402 S.W.2d at 87.

Reversing the judgment and opinion of the trial court, the Court of Appeals held, returning to the authority of the Restatement and *New York Times*, that "truth and

falsity aside" the March 26, 1992 editorial was not defamatory. RESTATEMENT (SECOND) OF TORTS, sec. 559; *New York Times*, 376 U.S. at 269.

The second editorial published by the respondents on December 17, 1992 was captioned:

> "QUESTIONS FOR THE FISCAL COURT"
>
> How could Herlen Lawless, Brad Redmond, Randell Hopper and Flanagan (the members of the Russell County Fiscal Court) vote to spend $50,000 when no one even seemed to know from whom they were buying the insurance or what they were buying?...Was this decision made behind closed doors and then rubber stamped without any real discussion in public?

The Court, observing that the petitioner did not actually vote on the issue, found that the statement was not completely false but "was substantially if not precisely true...lacking 'complete' falsity." (App., *infra.*, 8a). The Court determined that any inaccuracies were minor and that a statement may not be labeled as false if it is based on a minor mistake of fact or if the publication was substantially true. (App., *infra.*, 8a, n.11) Here, the reviewing Court, found from the record that the petitioner was constructively, if not officially, in favor of the insurance proposal; and, that the reported and published dollar amount, although not publicly stated by the petitioner, was reported to the respondent by a member of the fiscal court.

The Court of Appeals reversed the trial court's judgment and opinion, holding that "regardless of truth or falsity" the article, as a matter of law, was not defamatory.

The third editorial, published by the respondents on February 25, 1993, was found by the jury to be substantially incorrect and containing false facts. The article read:

QUESTIONS FOR THE FISCAL COURT
MONTHLY SURCHARGE IS THE BEST WAY TO
FUND DISPATCH AND 911

> However the meeting pointed up once again our concern about Russell County Judge-Executive Terril Flanagan, his attitude about taxing people, and his leadership about county government... Flanagan's suggestion that the dispatch service be funded by the occupational payroll tax shows that he has already begun an attempt to justify renewing the occupational payroll tax.

The Court of Appeals, relying on *Bell*, 402 S.W. 2d at 88, reversed the trial court and found that Flanagan had admitted the truth of the statement. The Court added the incidental *dictum* that by serving as a public official the petitioner "subjected his life to the closest public scrutiny for the purposes of determining whether the rights of the public are safe in his hands. (App., *infra.*, 9a ).

The Court of Appeals, in reversing on all matters, held that the record failed to support the jury's finding that the respondents' publications contained false facts and were substantially incorrect.

## REASONS FOR GRANTING THE PETITION

### I. The Kentucky Court of Appeals Independent Appellate Review Was Limited to What the Jury May Have Found, and This Failure to Consider the Whole Record Violates the Petitioner's First and Fourteenth Amendment Rights

The First Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution require, in public figure defamation cases, independent appellate review of the whole record. *New York Times* v. *Sullivan*. The Kentucky Court of Appeals limited their review, to those issues that the jury might have found, summarily dismissing what the jury did find.

The Kentucky Court of Appeals found it "unnecessary" to consider the "additional" element of actual malice in reversing the judgment of the trial court. (App., *infra.*, 10a) The Court found, pursuant to its independent appellate review, while failing to specifically define or identify it, that "constitutional malice" did not exist, and therefore, the issue need not be addressed. The reviewing Court simply dismissed the petitioner's cause on the de novo factual finding that "truth and falsity aside" and "regardless of truth or falsity" the respondents' publications were absolutely privileged under the First Amendment of the United States Constitution and Sections 1 and 8 of the Kentucky Constitution.[1] (App., *infra.*, 7a) The Court reached this conclusion by finding from the record, despite

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[1]Section 1 of the Kentucky Constitution, the "Bill of Rights" does not specifically address freedom of the press and guarantees generally:

> Rights of life, liberty, worship, pursuit of safety and happiness, free speech, acquiring and protecting property, peaceful assembly, redress of grievances, bearing arms.—All men are by nature, free and equal, and have certain inherent and inalienable rights, among which can be reckoned:
>
> . . .
>
> Fourth: The right of freely communicating their thoughts and opinions.

. . .

Section 8:

> Freedom of speech and of the press.-Printing presses shall be free to every person who undertakes to examine the proceedings of the General Assembly or any branch of government, and no law shall ever be made to restrain the right thereof. Every person may freely and fully speak, write and print on any subject, *being responsible for the abuse of that liberty.* (Emphasis added).

the jury's evaluation of the evidence proffered by both parties, that: (1) the respondents' publication assumed no implied facts concerning the petitioner or his conduct of office nor did the editorials raise by implication any undisclosed facts underlying the articles, that is, (2) the facts in issue were disclosed, "assumed" undefamatory, and substantially true.

In the March 26th editorial, the respondents' publication stated that the petitioner had presented a budget that was "$250,000" over being balanced. It was proven at trial that the budget was not "$250,000" over budget. Indeed, this factual inaccuracy in publication was admitted by the respondents in their brief to the Court of Appeals. The respondents acknowledged the falsity of the statement, stating that, the *arguably technical inaccuracy* of calling the budget not balanced when its paper figures showed equal revenues and expenditures. The Court of Appeals dismissed this fact by noting that "the average lay reader would *undoubtedly* interpret the statement as the opinion of the author". (App., *infra.*, 6a) The opinion of the author was stated as fact and the fact was wrong! The underlying facts were nonexistent and could not be "assumed" by anyone, much less by the Court of Appeals, in their independent review. The reviewing court further noted that this "opinion" was based upon "*allegedly* well know disclosed facts regarding the terms of the *proposed* county budget." (App., *infra.*, 7a) It defies rational belief how the appellate court, on their olympian banc, could determine how facts were allegedly well known and disclosed when the only testimony on the subject at trial came from the respondents! The opinion of the reviewing court, that the average lay reader, in a rural Kentucky hill county, would know what the underlying facts were in a *proposed* budget is absurd. One doubts that the learned members of this honorable court and its corps of erudite clerks have any inkling of the underlying facts of the proposed budget for the

District of Columbia. This finding, coupled with the respondents' admission of error, negates any issue of even substantial truth.

The editorial of December 17, 1992 likewise stated facts that were subject to the cold analysis of proof. The article said that the petitioner voted to spend $50,000. The petitioner did not vote on the issue at all, much less to spend $50,000. Here the reviewing court's exegesis of the facts would perplex Maimonides (who at least made an attempt to organize law into concepts that were understandable), and stifle scholastic and schoolman. The Court of Appeals found "substantial truth" from the respondents' testimony that they "believed the editorials to be true." (App., *infra.*, 11a) This post-publication belief was evidently co-opted by the reviewing court from the whole record. None of the petitioner's proof to the contrary was considered, nor were the admissions of the respondents. In an opinion that makes extensive reference to what the petitioner admitted, often by inference, the Court has no logical problem finding substantial truth from "believed facts" proven and admitted to be false! The jury found no truth from the whole record. The Court of Appeals found substantial truth from the respondents' record.

The jury's findings were supported by more than adequate evidence that the respondents established a pattern of malice toward the petitioner. The petitioner produced evidence that respondent Ed Cahill, the *Times Journal* managing editor, stated that "*they* were going to get him." Numerous witnesses and the evidence presented by both parties illustrated a pattern of malice displayed by the respondents toward the petitioner. Parenthetically, the *Times-Journal* published many articles critical of Flanagan; the trial court determined only three to evidence actual malice. The reviewing court simply refused to review the record as a whole.

In addition to its failure to consider all the facts in evidence, the reviewing Court failed to address any of the substantive law of public figure defamation. The Court refused to consider and follow this Court's guidance on the law of constitutional malice, opinion, truth and substantial truth and defamatory meaning. Indeed, the reviewing Court bracketed their opinion with *New York Times*, inserting and rearranging in the interstice obsolete state law and Restatement commentary, hoping by judicial calculus to craft an opinion that the Constitution would not support. This euclidean approach to the law of defamation failed to consider or apply the rules of law applicable to constitutional malice, opinion, substantial truth and defamatory meaning. The Court of Appeals conveniently dismissed these constitutional impediments by *refusing to even consider* the petitioner's evidence of actual malice, finding *per curium per saltum* that it did not exist, and therefore need not be considered.

Failing to consider the record as a whole is the first issue before this Court. By failing to consider and apply the applicable law to these issues, the reviewing Court could neither *legally meet nor factually comply* with this Court's constitutional tests to find the petitioner's cause without merit. The Court of Appeals summarily dismissed the complaint without remand or instruction to the trial court to find on the proper law, simply relying on the rubric of *New York Times*.

This Court held, in *New York Times* v. *Sullivan*, that in public figure defamation cases independent appellate review must be of the entire record:

> [W]e examine for ourselves the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment protect.

> (citations omitted) We must make an independent examination of the whole record. *New York Times*, 376 U.S. at 285.[2]

This Court's affirmance in *Bose* v. *Consumers Union of U.S. Inc.*, 466 U.S. 485, *affg* 692 F.2d 189 (1st Cir. 1982), established de novo review as the correct standard of review when an appellate court must consider constitutionally protected speech. *Harte-Hanks Communications* v. *Connaughton*, 491 U.S. 657 (1989) followed *Bose*, defining what facts were to be subject to independent review.

Independent appellate review requires that the reviewing court consider all the evidence. Further, the reviewing court must affirm the trial court's decision if it is supported by the record. That is, if the evidence supports the jury's determination, which in this case it does. *Brown & Williamson Tobacco Corp.* v. *Jacobson*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988). Independent appellate review is applicable only to issues of actual malice. *Id.* at 1129. Actual malice is the constitutional threshold of independent review. Clearly, by refusing to even consider the issue of actual malice, the Kentucky Court of Appeals failed to apply this standard as required by the

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[2]Kentucky has adopted this rule in *Ball* v. *E.W. Scripps*, 801 S.W. 684, (Ky. 1990), *cert. denied* 499 U.S. 976.

[3]The District of Columbia Circuit Court's opinion in *Tavoulareas* v. *Piro*, 817 F.2d 762 (D.C. Cir.), *cert. denied*, 484 U.S. 870 (1987). While affirming the district court's decision to overturn a jury verdict in favor of the plaintiff, the Circuit Court stated that granting judgment as a matter of law was appropriate only when,

> [T]he evidence together with all inferences that can reasonably be drawn...is so one-sided that reasonable men could not disagree on the verdict...considering all the evidence in the light most favorable to the [non-moving] party and abstain[ing] from assessing the credibility of the witnesses or weighing the evidence. *Id.*, 817 F. 2d at 795.

High Court in *Bose* and correctly applied by the Seventh Circuit in *Brown & Williamson*.[3] This Circuit has reiterated the common law standard that the law, on appeal, is applied to the facts, and not the facts to the law. Accordingly, the failure of the Kentucky Court of Appeals to conform to this basic standard, and confining their review to a "limited number of permissible findings" in essence denied the petitioner his right to a jury trial. The assumption that any finding of fact favorable to the defendant created an absolute opinion privilege under the First and Fourteenth Amendments of the United State Constitution is contrary to the rule of this Court. *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1 (1990) As recognized by Justice Scalia in his concurrence in *Harte-Hanks*:

> [W]e would not reverse judgment for the plaintiff, when dozens of other disputed contentions which the jury might have resolved in the plaintiff's favor *would* establish clear and convincing proof. We would, as the Sixth Circuit did, assume that all those disputes were resolved in the plaintiff's favor-unless, of course, we again devised some non-functional category of the remaining disputes that we could look to...I see no basis for consulting only a limited number of permissible findings. I would have adopted the Sixth Circuit's analysis in its entirety, making our independent assessment of whether malice was clearly and convincingly proved on the assumption that the jury made all the supportive findings it could have made. That is what common law courts have always done, and there is ultimately no alternative to it. *Id.*, 491 U.S. at 700.

The Kentucky Court of Appeals, relying on *Yancey* v. *Hamilton*, 786 S.W.2d 854 (Ky. 1989), and following the Restatement, found an absolute constitutional protection for opinion based upon a selective review of the record.

## II. The Kentucky Court of Appeals Failure to Review the Whole Record Creates a Separate Privilege For Opinion, in Violation of the First and Fourteenth Amendments to the United States Constitution

The First Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution neither provide for, nor acknowledge, an absolute privilege for the expression of opinion. *Milkovich* v. *Lorain Journal Co.*

The second issue before the Court, in this case, is the absolute right of opinion. The Kentucky Court of Appeals failed to follow the Supreme Court's direction in *Milkovich,* in which it held that the First Amendment does not create a privilege for expressions of opinion. Noting that the First Amendment does not require a separate "opinion" privilege limiting the application of state defamation laws (citing *New York Times*), the Supreme Court established the basis for a public figure defamation action.

First, the *Milkovich* court held, following *Philadelphia Newspapers* v. *Hepps,* 475 U.S. 767 (1986), that statements on matters of public concern must be provable as false before liability can be assessed. *Milkovich,* 497 U.S. at 15. In petitioner's case, facts were proven false.

Citing *Greenbelt Cooperative Publishing Assn.* v. *Bressler,* 398 U.S. 6 (1970), the Supreme Court held that statements that cannot reasonably be interpreted as stating actual facts about an individual are protected. *Milkovich,* 497 U.S. at 16. In the articles published by the respondents, facts were reasonably interpreted to be of and concerning the petitioner concerning his conduct and administration of his office.

Finally, the Court held that the "opinion privilege" as presumed by lower courts relying on *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974) was a result of "mistaken reli-

ance" on language the Court now considered as *dictum*. *Milkovich*, 497 U.S. at 18. That is, statements of opinion are never false, but false statements of opinion may be defamatory. The *Milkovich* court held that First Amendment interests were "adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact." *Id.*, 497 U.S at, 19. Kentucky courts still acknowledge this dichotomy. The Kentucky Court of Appeals, in refusing to consider the evidence as a whole, created this very artificial dichotomy between opinion and fact.

In the case before this Court, the reviewing court held that the record failed to support, as a matter of law, the jury's finding that the three editorials cited as a basis for the petitioner's claim contained false and defamatory statements. This judicial divination of the evidence led the Court of Appeals to conclude that, since the first element of a valid defamation claim was not satisfied, "it would be unnecessary for us to consider whether [the petitioner] successfully proved the additional elements of a defamation case." (App., *infra.*, 11a) Here the Court misconstrued *New York Times*, interpreting that case to allow plenary selection as well as interpretation of the evidence leading to the creation of the artificial dichotomy addressed in *Milkovich*. This erroneous application of *New York Times* and its corresponding result can only be avoided when reviewing courts apply the direction of *Milkovich* and follow the rule of *Harte-Hanks* as stated by this Court. Appellate courts must conduct a searching and dispassionate review of the entire record. The jury makes a finding in this case, examining evidence of fact, subject to proof or disproof, whether events occurred or did not occur, and found actual malice. The reviewing court may not controvert that jury finding by its own opinion of what the jury "may" have found. The Court of Appeals did not attempt to make an independent evaluation of the credibility of the

conflicting testimony concerning the jury's finding of actual malice. Instead the reviewing court isolated facts, dissecting the record, to reach a conclusion based on a false dichotomy of opinion and fact, confusing the question of actual malice with substantial truth.

### III. The Questions Presented Are Important

The issue of actual malice is a predicate, and not a conclusion, in the law of public figure defamation. The existence or non-existence of actual malice must be derived from the whole record and not from bits and pieces of evidence or the evidence favorable to one party only. The record on appeal is neutral. In this case, the Court of Appeals simply ignored the facts favorable to the petitioner, and the substantive law of defamation. Unfortunately, therefore, the proper application of that law is not before this Court.

That is the real issue underlying this case; and, it would be of great assistance to this Court, and to the benefit of constitutional clarity, for the respective parties to submit detailed briefs on these issues of law. There are diverse and conflicting lower court opinions and interpretations of this law. The Federal Circuits hold varied views concerning "opinion", "substantial truth" and indeed the definition of "constitutional malice." These issues are inextricably bound up in this case, as they are in all cases that reflect the continuing struggle with *New York Times* and its progeny. The thirty year old policy considerations of that historic case, and the need for this Court to make a legal synthesis of the law of public figure defamation, must be addressed. Justice Scalia's clarion call in *Harte-Hanks,* for a return to common law sanity, must be heard. These worthy considerations aside, the two issues before the Court in this action are the constitutionally mandated rule that due process requires a court, on independent appellate re-

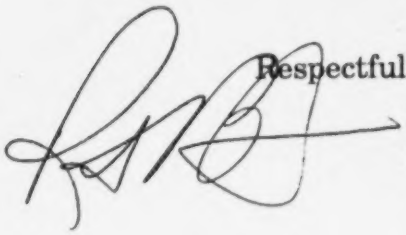
view, to examine the whole record, and the re-emphasis of *Milkovich* that there is no absolute First Amendment privilege for opinion.

The proper application of *Harte-Hankes* v. *Connaughton*, that a libel proof "opinion" defense is a question of fact for a jury and not of law for the court, is required and those facts must be considered, on review, by and from the whole and sum of the evidence. Once this evaluation is made, the reviewing court may then, and only then, under the rule of *Milkovich* v. *Lorain Journal Co.*, find a First Amendment protection for editorial opinion. *Milkovich* rejected the rule that language is not actionable if stated as opinion. If speech is provable as false, or, as in this case, reasonably implies underlying facts which are provable as false, then that speech may be defamatory. Since *Milkovich*, the reviewing court must decide, not whether the speech is fact or opinion, but whether the opinion implies facts provable as false and, if such language may be construed as defamatory, then the inquiry is properly a jury question.

In sum, while the Kentucky Court of Appeals clearly failed to consider any substantive law subsequent to *New York Times* v. *Sullivan*, and the respondents' cause should not be endorsed, this case presents the Court with the opportunity to bring much needed uniformity to the law of public figure defamation and should be heard. Therefore, the Court should grant the petition.

## CONCLUSION

The Petition for a writ of certiorari should be granted.



Respectfully submitted,

ROBERT L. BERTRAM
BERTRAM & WILSON
One Monument Square
Jamestown, Kentucky 42629
(502) 343-3101
*Counsel for Petitioner*

RENDERED: NOVEMBER 3, 1995; 10:00 A.M.
TO BE PUBLISHED

# COMMONWEALTH OF KENTUCKY
# COURT OF APPEALS

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## No. 94-CA-001332-MR

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DAVID J. CAZALET,
ED CAHILL, and
RUSSELL COUNTY NEWSPAPERS, INC., doing
business as THE TIMES JOURNAL - - - *Appellants*

*v.*

TERRILL FLANAGAN - - - - - - - - *Appellee*

---

*Appeal From Russell Circuit Court*
*Honorable Eddie C. Lovelace, Judge*
*Civil Action No. 93-CI-000076*

---

**OPINION REVERSING**—Entered June 19, 1996

BEFORE: HOWERTON, HUDDLESTON and MILLER, Judges.

HUDDLESTON, JUDGE. Russell County Judge/Executive Terril Flanagan brought this defamation action against *The Times Journal* based on three editorials the newspaper published criticizing his position on controversial county issues. A Russell circuit court jury returned a $1,000,000.00 verdict in Flanagan's favor. *The Times Journal*[1] appeals.[2]

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[1] Collectively, Russell County Newspapers, Inc., David J. Cazalet and Ed Cahill represent the interest of the newspaper. Cazalet is the newspaper's editor and publisher. Cahill is its managing editor.

[2] The Kentucky Press Association, Inc., together with fifty-seven other newspapers, submitted an Amicus Curiae brief urging reversal of the judgment.

Just as did the United States Supreme Court in the landmark First Amendment case, *New York Times* v. *Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686, 701 (1964), "we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." We have a duty to conduct "an independent examination of the whole record . . . to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.*, 376 U.S. at 285, 84 S.Ct. at 729, 11 L.Ed.2d at 709. *See also Restatement (Second) of Torts* ˇ 580A cmt. g (1977). The Supreme Court of Kentucky has expressly recognized this unique standard of review for defamation cases. *Ball* v. *E.W. Scripps Co.*, Ky., 801 S.W.2d 684, 686, 689 (1990) *(citing New York* Times). When the question revolves around the underlying facts as opposed to the issue of actual malice, "appellate review still must be in terms of what the jury could find as the true facts and what the jury could reasonably infer from the testimony of witnesses when considered as a whole." *Id.* at 688 *(citing Harte-Hanks Communications,* Inc. *v. Connaughton,* 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989)).

Flanagan was Russell County Judge/Executive at the time in question and, therefore, a public official.[3] The following elements must be present to establish defama-

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[3] Public officials are treated quite differently from private individuals in defamation cases., As the Supreme Court of Kentucky has stated, "[i]n the parlance of the horse industry, part of the turf of being a public official or public person is to be subject to public scrutiny." McCall *v. Courier-Journal and Louisville Times* Co., Ky., 623 S.W.2d 882 , 886 (1981). In 1966, the Court explained: "One who holds public office subjects his life to the closest scrutiny for the purpose of determining whether the rights of the public are safe in his hands." *Bell* v. *Courier-Journal and Louisville Times Co.*, Ky., 402 S.W.2d 84, 88 (1966).

tion of a public official: (1) A false[4] and defamatory[5] statement about the plaintiff;[6] (2) an unprivileged publication to a third party; (3) clear and convincing evidence of actual

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[4] "One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true." *Restatement (Second) of* Torts ˜ 581A (1977); *see also Bell*, 402 S.W.2d at 87 (indicating that truth is a complete defense to an action for libel in Kentucky). It is also clear that the publication need only be "substantially true." Bell, 402 S.W.2d at 87; *Pearce* v. *Courier-Journal & Louisville Times* Co., Ky.App., 683 S.W.2d 633 (1985).

[5] "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Restatement (Second) of* Torts S 559 (1977); see *also Ball* v. *E.W. Scripps Co.*, Ky., 801 S.W.2d 684, 688 (1990). Furthermore, "[i]t is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct, and the function of the jury to determine whether that meaning was attributed to it by the recipient of the communication." *Restatement* ˜ 566 cmt. c.

[6] "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory fact as the basis for the opinion." *Yancey* v. *Hamilton*, Ky., 786 S.W.2d 854, 857 (1989) (quoting *Restatement* (Second) *of Torts* ˜ 566 (1977)). "A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is." *Restatement* ˜ 566 cmt. c. This form of pure opinion is absolutely privileged. *Yancey*, 786 S.W.2d at 857.

malice[7] on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[8]

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[7] The United States Supreme Court has defined "actual malice" as the making of a statement with knowledge that the statement is false and defamatory or with reckless disregard for whether it is false or not. *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). *See also Warford* v. *Lexington Herald Leader* Co., Ky., 789 S.W.2d 758, 771 (1990); McCall, 623 S.W.2d at 885; *Restatement* S 580A. Flanagan states in his brief that the question of whether the newspaper had knowledge that the statements were false and defamatory is not before the court. Therefore, the only issue is whether *The Times Journal* acted in reckless disregard for the truth or falsity of the statements made in its editorials. "Reckless disregard" exists when there is "a high degree of awareness of . . . probable falseness" or there are "serious doubts as to [its] truth." *Restatement* ˇ 580A cmt. d. "Actual malice" is used "with an esoteric rather than a literal meaning. Ill will or desire to injure the other party does not in itself have the effect of taking a communication outside the protection of the Constitution." Id. See also *Garrison* v. Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125, 135 (1964).

[8] The distinction between "libel per se" and "libel per quod" was explained in E.W. *Scripps Co.* v. *Cholmondelay*, Ky.App., 569 S.W.2d 700, 702 (1978):

> One interpretation of "per sell and "per quod" refers, respectively, to whether a defamatory statement is made on the face of the article, or whether extrinsic facts must be pleaded to explain that the statement is defamatory. If extrinsic facts must be supplied, then it is said innuendo must be pleaded, and the article is libelous per quod.

Flanagan must plead and prove special damages here because the editorials in question are, if anything, libel per quod. See *generally Shields* v. *Booles*, 238 Ky. 673, 38 S.W.2d 677, 681 (1931) (stating that "it cannot be said that voting for or against the repeal of a statute of itself raised an inference of libelous import").

It is also important to note that the plaintiff, Flanagan here, has the burden of proving the elements of the case as well as the burden of proving that the statements were outside the scope of constitutional protection with clear and convincing evidence.[9] *Restatement* ˇ 580A cmt. f. To decide this case, it is necessary for us to apply the law of defamation to each editorial separately.

MARCH 26, 1992 EDITORIAL:
"A DO-IT-YOURSELF BUDGET"

The first editorial that Flanagan cites as a basis for his defamation action was published on March 26, 1992. It was published in response to public controversy over the county budget. Flanagan challenged the following statements:

- County Judge-Executive Terril Flanagan has washed his hands of the county budget.
- Flanagan has presented his proposal, which is at least $250,000 over being balanced, to the magistrates.

The Supreme Court of Kentucky has held that alleged defamatory matter must be considered as a whole. *McCall* v. *Courier-Journal and Louisville Times Co.*, Ky., 623 S.W.2d 882, 884 (1981). Specifically, "[t]he alleged defamatory words must be measured by their natural and probable effect on the mind of the average lay reader . . . ." *Id.* We cannot overlook the fact that this and the other editorials that Flanagan claims to be defamatory were published in the "Editorials and Comments" section of the newspaper under the conspicuous "In Our Opinion" heading. Considering that the "Editorials and Comments" section has traditionally served as a forum for opinions of the newspaper and citizens, the average lay reader would un-

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[9] In Hardin v. *Savageau*, Ky., S.W.2d 1995 WL 561620, (1995) , the Supreme Court held that the jury is to decide whether the "clear and convincing evidence" burden has been met. Because the Hardin rule applies prospectively, it is not relevant to this case.

doubtedly interpret the statements as the opinion of the author.

A statement of opinion is "actionable only if it implies the allegation of undisclosed defamatory fact as the basis for the opinion." *Yancey* v. *Hamilton*, Ky., 786 S.W.2d 854, 857 (1989) (quoting *Restatement* ˇ 566). "A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is." *Restatement* ˇ 566 cmt. c.

The statement alleging that Flanagan had "washed his hands" of the county budget is nothing more than a figurative phrase describing Flanagan's proposal. As recognized in *New York Times*, 376 U.S. at 271, 84 S.Ct. at 721, 11 L.Ed.2d at 701 *(quoting Cantwell* v. *Connecticut*, 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed.2d 1213, 1221 (1940)):

> To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to the enlightened opinion and right conduct on the part of the citizens of a democracy.

The opinions expressed in the March 26, 1992, editorial were based upon allegedly well-known disclosed facts regarding the terms of the proposed county budget. Considering the editorial context and the underlying facts, we believe that it was unreasonable for the jury to find that the statement was defamatory.

Flanagan further claims that the statement that the budget was "$250,000 over being balanced" was false. A statement of fact is not false if it is "substantially true." *Bell v. Courier-Journal* and *Louisville Times, Co.*, Ky., 402 S.W.2d 84, 87 (1966); *Pearce* v. *Courier-Journal & Louisville* Times, *Co.* Ky.App., 683 S.W.2d 633 (1985). *See also*

*Restatement* § 581A. Truth is a complete defense to defamation claims in Kentucky. Bell, 402 S.W.2d at 87. Considering that Flanagan admitted that the budget he submitted projected expenditures of $250,000.00 for which there was no corresponding source of income, it is apparent that the statement complained of was substantially true.

Truth and falsity aside, however, we must point out that these statements are simply not defamatory. The newspaper's criticism of Flanagan's budget proposal cannot be said to harm the public official's reputation in a way that would lower him in the estimation of the community or to deter others from associating with him. *Restatement* ˇ 559. As the United States Supreme Court has said, "[i]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions . . . . " *New York* Times, 376 U.S. at 269, 84 S.Ct. at 720, 11 L.Ed.2d at 700 *(quoting Bridges v.* California, 314 U.S. 252, 270, 62 S.Ct. 190, 197, 86 L.Ed. 192, 207 (1941)). Some even consider this type of public discourse to be a political duty. *Id.* The constitutional guarantees of free speech and press" require us to reverse the finding of defamation concerning the March 26, 1992, editorial.

DECEMBER 17, 1992 EDITORIAL:
"QUESTIONS FOR THE FISCAL COURT"

Flanagan challenges the following question asked in the December 17, 1992, editorial: "How could Herlen Lawless, Brad Redmon, Randall Hopper and Flanagan vote to spend $50,000 when no one even seemed to know from whom they were buying the insurance or what they were buying?" Flanagan claims that this question implies false facts. First, Flanagan says that he did not actually vote on the issue. Second, Flanagan claims that the issue voted on was whether to buy insurance, not whether to spend $50,000.00.

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[10] U.S. Const. amend. I; Ky. Const. §§ 1 and 8.

Although Flanagan did not actually vote on the insurance issue, the statement was not completely false[11] to say that he did when he brought the issue before the fiscal court, supported the purchase and admits that he would have voted in favor of the purchase had he voted. Flanagan testified that it was his practice to count the votes of the four other members of the fiscal court before voting himself. Since the vote on this issue was three-toone without Flanagan's vote, Flanagan decided that it was unnecessary for him to vote. Flanagan's vote, either for or against the purchase, would not have changed the outcome. Flanagan also testified that, as the presiding member of the fiscal court, it was his practice to count a person who does not cast a vote on an issue with the majority. By virtue of his own practice, Flanagan cannot escape being counted with the majority by refusing to vote on controversial issues. Accordingly, the statement was substantially if not precisely true.

Flanagan's claim that the vote was merely on whether to purchase insurance, not whether to spend $50,000.00, also lacks complete falsity considering that another member of the fiscal court reported the $50,000.00 price to the press. We will not label a statement as false based upon such minor inaccuracies in the rephrasing of the actual vote. Again, the statement was substantially true.

Regardless of truth or falsity, there is nothing defamatory about saying that a public official supported

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[11] *See Restatement* § 581A cmt. f ("slight inaccuracies of expression are immaterial" if the statement is "true in substance.").

thepurchase of health insurance for county employees.[12] The record simply fails to support a finding of defamation. Therefore, we must reverse the finding that the December 17, 1992, editorial was false and defamatory.

FEBRUARY 25, 1993 EDITORIAL: "MONTHLY SURCHARGE IS THE BEST WAY TO FUND DISPATCH AND 911"

The final basis for Flanagan's defamation claim is found in a February 25, 1993, editorial. Considering that Flanagan has admitted the truth of the statements contained therein,[13] we need not consider this editorial further. Truth is a complete defense to defamation claims in Kentucky. *Bell*, 402 S.W.2d at 87. Furthermore, we cannot ignore the fact that when Flanagan became Judge/Executive, he became a public official. By serving as a public official, Flanagan subjected "his life to the closest scrutiny for the purpose of determining whether the rights of the public are safe in his hands." *Id.* at 88. We reiterate:

> There is a well-known expression applied to those in public office, "If you can't stand the heat, you'd better stay out of the kitchen." Confrontation has a salutary effect and causes those in positions of public responsibility to practice thoughtfulness and wisdom in their utterances and carefully weigh their decisions. *Record-Times, Inc.* v. Town *of Wheatland*, 650 P.2d 297, 301 (Wyo. 1982).

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[12] "If the only question is whether the language is capable of bearing a particular meaning and whether that meaning is defamatory or not, that question is one of law . "*Restatement*" 580A cmt. d. While it is true that the issue of whether the defendant acted with knowledge or in reckless disregard of falsity is usually one of fact to be decided by a jury, the present case turns on the issue of whether there was a false and defamatory statement at all.

[13] Flanagan testified: "Well, I don't deny making the statement. But, once again, the courthouse is full of people, three-hour meeting, I had a 30-second spot. And who makes the editorial page? Old Terril again . . . ."

The record in this case fails to support the jury's finding that the three editorials cited as the bases for Flanagan's defamation claim contain false and defamatory statements. Considering that we have found that the first element of a valid defamation claim is not satisfied, it is unnecessary for us to consider whether Flanagan successfully proved the additional elements of a defamation case.[14] Nevertheless, we entertain serious doubt as to whether Flanagan established either actual malice or special damages. Actual malice does not exist unless the "defendant . . . entertained serious doubts as to the truth of his publication." *E.W. Scripps Co.* v. *Cholmondelay*, Ky.App., 569 S.W.2d 700, 704 (1978). In addition to the newspaper's managing editor's testimony that he believed the editorials to be true, Flanagan admitted the absence of actual malice in his opening statement.[15]

There is also a lack of evidentiary support for a finding of special damages. Proof of special damages requires evidence of actual economic loss. *Columbia Sussex* Corp., Inc. *v. Hay*, Ky.App. , 627 S.W.2d 270, 274 (1981). Proof of mental anguish[16] and a lost election,[17] the only harm Flanagan claims to have suffered, is not sufficient to establish special damages.

Since we reverse the judgment in favor of Flanagan, it is unnecessary that we consider other issues raised by the

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[14] The elements are set forth at the beginning of this opinion.

[15] Flanagan's attorney said: "*The Times Journal* evidently thought that all these things were true that they had said."

[16] Rich v. *Kentucky Country Day, Inc.*, Ky.App., 793 S.W.2d 832, 837 (1990) (special damages require more than "just mental pain, humiliation, disgrace or mortification").

[17] *Taylor* v. *Moseley*, 170 Ky. 592, 186 S.W. 634, 637 (1916) (special damages cannot be based upon an unfavorable election result).

newspaper, including its claim that punitive damages were improper under Ky. Rev. Stat. (KRS) 411.051.

The judgment is reversed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:
Jon L. Fleischaker
WYATT, TARRANT & COMBS
Louisville, Kentucky

ON BRIEF:
Deborah H. Patterson

BRIEF FOR AMICI:
Michael L. Judy
James L. Thomerson
STOLL, KEENON & PARK
Lexington, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Robert L. Bertram
BERTRAM & WILSON
Jamestown, Kentucky

# SUPREME COURT OF KENTUCKY

**95-SC-1024-D**
**(94-CA-1332)**

TERRILL FLANAGAN - - - - - - - - - *Movant*

*v.*

DAVID J. CAZALET,
ED CAHILL, and
RUSSELL COUNTY NEWSPAPERS, INC.,
d/b/a THE TIMES JOURNAL - - - - *Respondents*

*Russell Circuit Court*
*No. 93-CI-76*

**OPINION DENYING DISCRETIONARY REVIEW**
—Entered June 14, 1996

The motion for review of the decision of the Court of Appeals is denied.

The opinion of the Court of Appeals is ordered not to be published.

ENTERED June 12, 1996.

/s/ Robert F Stephens
Chief Justice

Supreme Court, U.S.
FILED
OCT 15 1996
OFFICE OF THE CLERK

No. 96-399

In The

# Supreme Court of the United States

October Term, 1996

TERRIL FLANAGAN,

*Petitioner,*

v.

DAVID J. CAZALET, ED CAHILL,
and RUSSELL COUNTY NEWSPAPERS, INC.,
d/b/a THE TIMES JOURNAL,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Kentucky Court Of Appeals**

## RESPONDENTS' BRIEF IN OPPOSITION

JON L. FLEISCHAKER
*Counsel of Record*
DEBORAH H. PATTERSON
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235
*Counsel for Respondents David J. Cazalet, Ed Cahill, and Russell County Newspapers, Inc., d/b/a The Times Journal*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED FOR REVIEW

Petitioner seeks this Court's review based on the following stated question:

> Whether a reviewing court may limit the number of possible findings that a jury may have reached in their determination of constitutional malice in a public figure defamation case.

## PARTIES TO THE PROCEEDING

The parties to this proceeding are as named on the caption to the Petition and this Brief in Opposition. Pursuant to Sup. Ct. R. 29(6), Respondents state that Defendant Russell County Newspapers, Inc. is a stand-alone corporation, with no parent or subsidiary companies.

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## RESPONDENTS' BRIEF IN OPPOSITION

Respondents, David J. Cazalet, Ed Cahill and Russell County Newspapers, Inc., d/b/a *The Times Journal*, respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the November 3, 1995 Opinion Reversing rendered by the Kentucky Court of Appeals.

## OPINIONS BELOW

The Opinion Reversing of the Court of Appeals, which was the highest state court to actually review and decide the case, is reprinted for the Court's convenience as Appendix A to this Brief in Opposition. The Opinion Denying Discretionary Review of this case entered by the Supreme Court of Kentucky is reprinted at Appendix 12a to the Petition.

## JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. §1257(3). Despite the framing of the question presented to this Court in the Petition, the ultimate basis for the Kentucky Court of Appeals' opinion below was grounded firmly in state defamation law. Holding it unreasonable for the jury to have found the statements at issue in the defamation action were false and defamatory, prima facie prerequisites to Petitioner's state law cause, the Court of Appeals

properly never reached the constitutional issue of actual malice.[1]

## STATEMENT OF THE CASE

Respectfully, the Petition does not begin to summarize adequately the tone and substance of the trial that took place in Russell County, Kentucky, in 1994.[2]

The Petition fails to explain how the jury was justified to award $1 million to a politically active and well known, though recently unseated, top elected county official because three editorials appearing in the local newspaper criticized his position on a controversial occupational tax and the county budget. The Petition fails to depict the evidentiary fiasco that flowed from a cause that was initiated, tried and ultimately won on a negative press theory and nothing more. As Petitioner's counsel summed up his case to the jury in closing arguments: " . . . the bulk of evidence was that there was no positive press, that everything was negative" [TR: Tape D – 4/27/94 – 16:23:25].

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[1] Petitioner admits that the "real issue" underlying his case is not actual malice but the substantive law of defamation, which is, of course, state law [Petition at 17].

[2] The Petition is fraught with misrepresentations concerning the Court of Appeals' decision. The decision is straightforward and based on firmly established principles of state defamation law. Petitioner's confusing attempt to make the decision seem otherwise is unavailing. Accordingly, Respondents specifically attach the Opinion Reversing to their Response herein and affirmatively state that the printed words of the Court of Appeals speak for themselves.

Most importantly to Petitioner's stated appeal to this Court, the Petition fails to provide an accurate account of the undisputed evidence at trial, which fully substantiates the Court of Appeals' decision that the commentaries at issue were either true, substantially true or protected opinion and accordingly incapable of forming even a prima facie basis for a defamation claim under state law.

* * *

In March 1993, Petitioner Terril Flanagan, former County Judge Executive of Russell County, brought a defamation action against Respondents Russell County Newspapers, Inc. and two of its editors based on three editorials published in *The Times Journal* relating to the elected official and his performance of his public duties. [Copies of the three editorials at issue are attached hereto as Appendices B, C and D]. The Complaint alleged that the editorials were "false and incorrect" and were "calculated to diminish pubic confidence" in the Judge Executive.

The first editorial at issue in Flanagan's Complaint was published on March 26, 1992 and concerned the county budget, an issue of considerable public controversy at the time. *See* Appendix B hereto. Entitled "A do-it-yourself budget," the editorial opined that the County Judge had "washed his hands of the county budget" and "turned his back on the magistrates." Despite the fact that these statements were clearly opinion, and based on admittedly true facts, Flanagan attacked these statements of opinion at trial. In an apparent effort to establish that the newspaper's opinion about his involvement with the budget was false, he produced an array of individuals to

testify about *their* opinion of the County Judge's actions. For example, one witness, when asked whether the newspaper's statement was true, told the jury:

> Well, of course, Mr. Bertram, *in my opinion*, as county attorney, I don't – I did not see it that way, no. I would say he [Flanagan] did not turn his back on the Magistrates, but that was from me; the perspective that I had [TR: Tape B – 4/26/94 – 09:04:25].

*The Times Journal* fully disclosed to its readers the factual reasons for its opinion that Judge Flanagan had washed his hands of the county budget: He gave the magistrates a budget that was $250,000 out of balance and left it to the magistrates to do the balancing by either a cut in spending or a tax raise. Flanagan admitted that his revenue figures were illusory and that the budget had $250,000 for which there was no source of income. He admitted:

> There are $250,000 in other revenues that had to be raised to balance the budget or either cuts made . . . [TR: Tape A – 4/25/94 – 11:17:29].

Petitioner's own testimony established that the newspaper's statements concerning the unbalanced budget were substantially true.

The second editorial identified in Flanagan's Complaint was published on December 17, 1992 and entitled "Questions for the Fiscal Court." *See* Appendix C hereto. The editorial contains the newspaper's general opinion that Russell Countians ought to be inquiring into the specifics of the county health insurance purchase, which the newspaper pointed out is funded by "hard-earned tax dollars." At trial, Flanagan testified that his complaint

with this editorial revolved around the following published question:

> How could Herlon Lawless, Brad Redmon, Randall Hopper and Flanagan vote to spend $50,000 when no one even seemed to know from whom they were buying the insurance or what they were buying?

[TR: Tape A – 4/25/94 – 11:21:00]. Flanagan attempted to prove at trial, by way of the fiscal court meeting minutes, that the statement was false because the vote was technically one simply to purchase insurance, not a vote to spend $50,000 on insurance, and because he did not officially cast a vote on the proposal that passed on a 3-1 margin. His own testimony at trial, however, refuted the claim of falsity and instead supported the conclusion that the gist or sting of the editorial was "substantially true."

Flanagan took issue with the newspaper's statement that he *voted* to purchase the insurance. Yet he admitted at trial that he "certainly" favored the plan and *would have voted* for the measure if his vote would have made a difference [TR: Tape A – 4/25/94 – 15:06:54]. Further, he admitted that it was his understanding at the time the vote was taken that a person who does not cast a vote on a particular item is assumed to be voting with the majority [TR: Tape A – 4/25/94 – 15:07:41]. The gist or sting of the newspaper's statement here was that Flanagan supported the purchase of health insurance. Flanagan's testimony at trial establishes this was true.

Flanagan also challenged the editorial's statement that fiscal court "vote[d] to spend $50,000" for insurance. Again Flanagan attempted to prove that the statement

was false by means of a technicality. The record shows, however, that although the fiscal court voted only generally to purchase insurance, a news article that ran the same day of the editorial quoted Deputy Judge Executive Bob Bernard as stating the insurance would cost $50,000 [TR: Tape A – 4/25/94 – 15:00:36]. Bernard admitted the truth of that quotation at trial [TR: Tape B – 4/25/94 – 16:43:23]. Again, the undisputed evidence establishes that the newspaper's statement was substantially true.

The third editorial identified as defamatory in Flanagan's Complaint was entitled "Monthly surcharge is the best way to fund dispatch and 911." *See* Appendix D hereto. In it the newspaper voices its support for a proposed $1 telephone surcharge to fund the emergency dispatch and 911 services in Russell County. The editorial reported on a discussion at a joint county government session at which Flanagan was quoted as telling the assembly that an occupational payroll tax would also be a way to pay for the services. At trial, Flanagan did not deny making this statement [TR: Tape A – 4/25/94 – 15:09:42].

> Well, I don't deny making the statement. But, once again, the courthouse is full of people, three-hour meeting, I had a 30-second spot. And who makes the editorial page? Old Terril again. . . .

There was no evidence at trial that the statements in the third editorial were false.

After an hour and a half deliberation, the jury returned a verdict in favor of Flanagan and awarded damages in the amounts of $340,000 for embarrassment,

humiliation and mental anguish; $160,000 for economic loss in the form of lost wages; and $500,000 in punitive damages. On its verdict forms, the jury was asked whether they "believed from the evidence you have heard" that the three editorials at issue were "substantially incorrect" [TR 531]. They answered "yes," despite the undisputed evidence at trial, mainly in the form of Flanagan's own admissions, that the statements in the three editorials were substantially true.

The jury was also asked on the verdict form if the three editorials were "published by the newspaper or its editors with knowledge that the facts contained in [each] editorial were false or that the newspaper or its editors acted in reckless disregard of whether the facts contained in the editorial were true or false." Again, despite a blatant lack of supporting evidence, the jury answered "yes."

*The Times Journal* appealed the $1 million verdict citing as grounds a whole host of errors as to the sufficiency of the evidence, the conduct of the proceedings, the assessment of damages, and matters of law. In its brief to the Court of Appeals, the newspaper addressed the following errors, any one of which was sufficient to warrant reversal:

- The jury's verdict against the newspaper is not supportable in light of undisputed evidence at trial that the editorials at issue were either substantially true or opinion.
- The editorials at issue relating to top elected official's positions and actions concerning county finances were not capable of a defamatory meaning, as a matter of law. Further, there was no evidence at trial that any

person thought less of Flanagan as a result of the editorials.

- Flanagan failed to allege and prove special damages.
- The record contains no evidence, much less clear and convincing evidence, to support a finding of "actual malice."
- The trial court erred in overruling the newspaper's Motion for Summary Judgment.
- The trial court erred in allowing the admission of additional articles and editorials that were more prejudicial than probative and that tended to confuse the jury, all to newspaper's prejudice.
- The trial court erred in allowing improper lay opinion and hearsay with regard to Flanagan's damage claims regarding reputation and economic loss.
- The trial court erred in denying newspaper's motion for a new trial where Flanagan's counsel engaged in impermissible arguments relating to the newspaper's "out of town" ownership, all meant to impassion the jury.
- The trial court erred in denying directed verdict on punitive damages at the end of plaintiff's case where plaintiff failed to put on sufficient proof of a retraction demand as required by KRS 411.051.
- The trial court erred in its instructions to the jury where it did not identify Flanagan as bearing the burden of proof and requiring a showing of clear and convincing evidence as to all issues.
- The trial court abused its discretion in refusing to set aside the damages awarded as given under the influence of passion or prejudice.

On November 3, 1995, the Court of Appeals in a unanimous opinion reversed the $1 million judgment in favor of this former Judge Executive. *See* Appendix A hereto. The Opinion did not address the multiple of other grounds and issues cited by the newspaper supporting such a reversal. It was unnecessary.

> The record in this case fails to support the jury's finding that the three editorials cited as bases for Flanagan's defamation claim contain false and defamatory statements. Considering that we have found that the first element of a valid defamation claim is not satisfied, it is unnecessary for us to consider whether Flanagan successfully proved the additional elements of a defamation case.

Opinion Reversing, Appendix A-11. Though it explicitly did not reach the issue, the Court went on to express "serious doubt as to whether Flanagan established either actual malice or special damages,"[3] either one of which alone suffices as a wholly independent ground for reversal.

Early in the decision, the Court set forth its review standard as being "what the jury could find as the true facts and what the jury could reasonably infer from the testimony when considered as a whole."[4] Opinion

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[3] Of course, necessity for reversal of the verdict due to the absence of special damages is a pure state law issue not subject to the jurisdiction of this Court.

[4] Contrary to what appears to be the whole thrust of Petitioner's plea to this Court, this is the correct standard. As Petitioner points out: "Independent appellate review is applicable only to issues of actual malice." Petition at 13. This appeal was not decided on actual malice issues.

Reversing, Appendix A-2 (citing *Ball v. E.W. Scripps Co.*, 801 S.W.2d 684, 688 (Ky. 1990), *cert. denied*, 499 U.S. 976 (1991)). The Court then "appli[ed] the law of defamation to each editorial separately." Opinion Reversing, Appendix A-5.

The Court examined the very statements specified by Flanagan in his Complaint to determine if they were false and defamatory, the first of four *prima facie* elements in a Kentucky defamation action. The threshold importance of and the *established legal standards* relating to the issue of falsity were set forth in a footnote:

> "One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true." *Restatement (Second) of Torts* §581A (1977); *see also Bell*, 402 S.W.2d at 87 (indicating that truth is a complete defense to an action for libel in Kentucky). It is also clear that the publication need only be "substantially true." *Bell*, 402 S.W.2d at 87; *Pearce v. Courier-Journal & Louisville Times Co.*, Ky.App., 683 S.W.2d 633 (1985).

Opinion Reversing, Appendix A-3 n.4. Based on that legal standard and the undisputed record at trial, the Court held that all the editorials were either "substantially true" or statements of opinion based on disclosed facts and hence not actionable.[5] The jury's finding to the contrary was unreasonable, according to the Court.

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[5] Regarding the Court of Appeals' decision that the December 17, 1992 editorial was substantially true, Petitioner states that the Court found "substantial truth" from respondents' testimony that they "believed the editorials to be true." Petition at 11. Petitioner's statement is blatantly incorrect, but generally characteristic of his analysis of both the substance

The Court also found that the published statements were not defamatory. Important to the holding was the fact that the editorials appeared in the "Editorials and Comments" section of the newspaper, a "section [that] has traditionally served as a forum for opinions of the newspaper and citizens" and one which "the average reader would undoubtedly interpret the statements as the opinion of the author." Opinion Reversing, Appendix A-6. More importantly, the Court held that, as a matter of law, "the newspaper's criticism of Flanagan's budget proposal cannot be said to harm the public official's reputation in a way that would lower him in the estimation of the community or to deter others from associating with him."[6] In fact, rather than finding "this type of public discourse" a source of liability, the Court cited *New York Times Co. v. Sullivan* for the proposition that it is a source of public duty. Opinion Reversing, Appendix A-8.

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and bases for the Court of Appeals' decision. The Court did not base its finding of substantial truth on "believed facts" but rather on the cold analysis of factual proof – undisputed proof, which included admissions of Flanagan himself. *See supra* at 5-6. The Court mentioned the testimony that the newspaper's managing editor "believed the editorials to be true" *only* in its three sentences of dicta relating to actual malice, an issue the Court explicitly did not reach.

[6] Under Kentucky law, even a published misrepresentation concerning a public official's position on a particular issue is not actionable, because it is not defamatory. *Shields v. Booles*, 38 S.W.2d 677 (Ky. 1931) (newspaper article that falsely printed a state senator voted in favor of legalized gambling was not defamatory because it "had no inherent tendency to affect [the senator's] character or reputation, since such a vote was within the province of any representative confronted with the problem").

As a general matter, the Court of Appeals correctly stated that *The Times Journal*'s commentaries on this public official's performance of his public duties is precisely the kind protected by the First Amendment under the principle that "debate on public issues should be uninhibited, robust and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Opinion Reversing, Appendix A-2 (citing *New York Times Co. v. Sullivan*, 376 U.S. at 270). More basic to this case, however, the editorials are substantially true and are not defamatory.[7] Relying on evidence of record and the established law of this state, the Court of Appeals correctly reversed the jury's verdict as unreasonable and unsupported.

Dissatisfied with the Court of Appeals' decision vacating his $1 million award, Petitioner sought discretionary review from the Supreme Court of Kentucky. Adhering to the standard that discretionary review "will be granted only when there are special reasons for it," the highest state court declined to rehear the case. *See* Opinion Denying Discretionary Review, Petition at App. 12a.

## REASONS FOR DENYING THE PETITION

Undaunted, Petitioner now seeks the assistance of the Supreme Court of the United States to reclaim his lost

[7] For example, it is difficult to accept the assertion that it is defamatory to state that a public official is in favor of health care for county employees.

award. His Petition must fail, however, because there are no "compelling reasons" that would justify a writ of certiorari here. Sup. Ct. R. 10.

In an attempt to fashion an issue that might catch the eye of this high Court, Petitioner revolves his Question for review around "constitutional malice" and accuses the Court of Appeals, in quite caustic language, of misapplying the independent review standard for "actual malice" cases. At least, that is what Respondents *think* Petitioner is saying. With all due respect, the Question Presented in Flanagan's Petition is confusing, at best, and his supporting argument drifts back and forth between discussions of "substantial truth" and that of "actual malice."

The bottom line in the Court of Appeals' Opinion is that the Court found it was unreasonable, based on the relevant evidence, for the jury to find that the editorial statements at issue were false or defamatory. Certainly, falsity is a *threshold* issue in any defamation action. It is, as the Court of Appeals points out, an indispensable element of proof to the state law cause of action for defamation.

> The following elements must be present to establish defamation of a public official: (1) A false and defamatory statement about the plaintiff; (2) an unprivileged publication to a third party; (3) clear and convincing evidence of actual malice on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Opinion Reversing, Appendix A-3, 4 (footnotes omitted).

The law of Kentucky has always provided that truth is a complete defense to an action for libel. *Bell v. Courier-Journal & Louisville Times Co.*, 402 S.W.2d 84, 87 (Ky. 1966) (citing *Brents v. Morgan*, 299 S.W. 967 (Ky. 1927)). "[T]his is so although the publication may have been inspired by malice or ill will or be libelous per se." *Id.* Accordingly, if a statement is true, it cannot under any circumstances be actionable.[8]

Further, courts have long agreed that a libel plaintiff does not satisfy his burden to prove that a statement about him is false by pointing to technical inaccuracies. *A statement is not false as long as it is "substantially true." Bell v. Courier-Journal & Louisville Times*, 402 S.W.2d 84, 87 (Ky. 1966); *Moldea v. New York Times Co.*, 15 F.3d 1137 (D.C. Cir. 1994) (citing *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 825 (1988); Restatement (Second) of Torts §581(A), comment f (1977) ("slight inaccuracies of expression are immaterial" if the alleged defamatory statement is "true in substance."). Indeed,

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[8] In *Philadelphia Newspapers, Inc. v. Hepps*, this Court strengthened the threshold importance of the truth issue by requiring public figure plaintiffs to bear the burden of proving falsity. 475 U.S. 767, 775 (1986). Without such proof, the plaintiff cannot prevail.

> [A] public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation. See *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964) (reading *New York Times* for the proposition that "a public official [is] allowed the civil [defamation] remedy only if he establishes that the utterance was false").

> [m]inor inaccuracies do not amount to falsity so long as "the substance, the gist, the sting, of the libelous charge be justified."

*Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991).

The only evidence of falsity in this case relates to technical inaccuracies in the editorials that in no way affect the "gist or sting" of the statements. *See McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 884 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982) (article must be analyzed in its entirety to determine if its "gist or sting" is defamatory). The editorials at issue relate exclusively to Judge Flanagan's position on several budgetary issues. They clearly are commentaries about very controversial subjects of substantial public concern in Russell County. They do not allege any criminal activity nor do they relate to any private matters concerning the official. They are nothing more than this newspaper's opinions, with accompanying underlying true facts, about an elected official's position on issues of public concern. *Ball v. E.W. Scripps Co.*, 801 S.W.2d 684, 690 (Ky. 1990), *cert. denied*, 499 U.S. 976 (1991) (holding a statement in the form of an opinion can *only* be actionable "if it implies the allegation of undisclosed defamatory fact as a basis for the opinion").[9]

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[9] *See also Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 730 (1st Cir. 1992), *cert. denied*, 504 U.S. 974 (1992); *Dworkin v. L.F.P., Inc.*, 839 P.2d 903 (Wyo. 1992) and the host of other authorities that espouse the principle that the only statements about public figures not entitled to full protection are those that declare provably false, defamatory facts about a person or those

The Court of Appeals found, correctly so, that County Judge Flanagan had failed to prove the editorial statements at issue were false and that the jury was "unreasonable" to find to the contrary. The Court cites the abundance of evidence from the trial record, including Flanagan's own admissions, that establishes the statements were either true, substantially true, or pure opinion accompanied by disclosed, true underlying facts.

Having reversed the judgment in favor of Flanagan on the falsity issue, the Court stated it was unnecessary to consider "whether Flanagan successfully proved the additional elements of a defamation case," as well as the numerous other trial errors raised by Respondents. Opinion Reversing, Appendix A-11. It is with this, apparently, that Petitioner takes issue. The Petition contends that by declining to consider actual malice claims, the Court of Appeals impermissibly ignored the "independent appellate review" standard set forth in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), *reh'g denied*, 467 U.S. 1267 (1984) and its progeny. In the same breath, however, Petitioner acknowledges that "[i]ndependent appellate review is applicable only to issues of actual malice." The logic is puzzling.

Essentially, Petitioner would have this Court declare that, as a matter of constitutional law, state appellate

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expressing opinions that imply some undisclosed false factual basis to which the reader is not generally privy. The Court of Appeals found, after applying this standard to the undisputed record, that the editorials concerning Flanagan were fully protected.

courts must consider all evidence concerning, and specifically rule on claims relating to, actual malice even in defamation actions where plaintiffs have failed to prove falsity.[10] The position has no rational basis. As the Court of Appeals stated, such a review is "unnecessary." There can be no liability for the publication of a true statement of fact or a protected statement of opinion. If a public figure plaintiff cannot prove that the statement made concerning him was false, it would be impossible for him to prove that the statement was published with knowledge of its falsity.

Perhaps the confusion obvious from the Petition stems from the fact that Flanagan continues even now, as he has throughout the trial and the appeal, to display a gross misunderstanding, or deliberate disregard, for the concept of "actual malice." As a matter of constitutional law, for the jury to have found as it did, in favor of this public official in his defamation action, it was required to find *both* that the editorial statements were false *and* that the newspaper published them with "actual malice" – *i.e.*, that it either knew the statements were false when published or entertained serious doubts as to their truth. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Ball v. E.W. Scripps Co.*, 801 S.W.2d 684, 688-89 (Ky. 1990), *cert. denied*, 499 U.S. 976 (1991).

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[10] Petitioner states that "the issue of actual malice is a predicate" in the law of public figure defamation law. Petition at 17. This is wrong. Public figure plaintiffs must first prove falsity. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). In the absence of falsity, proof of actual malice is not only an irrelevant, but an impossible, burden to meet.

The Court of Appeals did not reach the issue of actual malice, but if it had, an independent review would have shown no evidence in the record of the magnitude or type necessary to support a finding of "actual malice" in this case. Instead of proving "knowing falsity," as *New York Times* emphatically requires, Flanagan spent the bulk of the trial confusing the jury by introducing some twenty "other" articles, which his counsel declared in closing fully supported his "negative press" theory of liability. The focus of the trial at all times rested on bad press and ill will, an impermissible and outrageously prejudicial tactic.[11] "Liability for libel of a public official cannot be predicated on a mere showing of a false statement and general hostility on the part of the party accused." *Greenbelt Cooperative Publishing Assoc. v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537 (1970).

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[11] While the Kentucky Supreme Court held in *Ball v. E.W. Scripps Co.*, 801 S.W.2d 684 (Ky. 1990), *cert. denied*, 499 U.S. 976 (1991), that evidence of other articles is admissible as circumstantial evidence of defendant's state of mind, it is imperative that the jury understand that the state of mind which ultimately must be proved by the Plaintiff is knowing falsity, not ill will. *Henry v. Collins*, 380 U.S. 356, 357 (1965) (plaintiffs cannot ground their claim "on a showing of intent to inflict harm," but must, instead, show an "intent to inflict harm through falsehood").

> The danger of admitting ill-will or bad-motive evidence is that the jury will mistakenly hold the defendant liable for his attitude toward the plaintiff rather than his attitude toward the veracity of his statements concerning the plaintiff.

*Tavoulareas v. Piro*, 817 F.2d 762, 795 n.45 (D.C. Cir.), *cert. denied*, 484 U.S. 870 (1987).

The record contains no evidence to support a finding of "actual malice."[12] To the contrary, Petitioner's counsel effectively admitted the absence of actual malice at trial in his opening statement when he told the jury that "[t]he Times Journal evidently thought that all these things were true that they had said" [Tape A – 4/25/94 – 10:30:53].[13] This admission is supported by Defendant David Cazalet's own testimony at trial that he believed the February 26, 1993 editorial was true when he wrote it and he still so believed [Tape C – 4/27/94 – 15:40:58].

Petitioner contends that the jury's findings were supported by more than adequate evidence of a "pattern of malice" against him. Petition at 11. A "pattern of malice" is not actual malice. But, more to the point, evidence of a pattern of malice, to the extent any existed at all, is in no way relevant to the Court of Appeals' finding that the editorial statements at issue were not false and defamatory. *See Bell v. Courier-Journal & Louisville Times Co.*, 402

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[12] Flanagan had witnesses testifying that they overheard Defendant Ed Cahill stating an intention "to get" the judge. This evidence of ill will, which was refuted by Cahill, is not sufficient to establish "knowing falsity." *Tavoulareas v. Piro*, 817 F.2d 762, 795 (D.C. Cir.), *cert. denied*, 484 U.S. 870 (1987) (evidence of statements by defendant of plan to "get" plaintiff not indicative of a willingness to publish falsehoods).

[13] Kentucky courts consistently have granted directed verdicts based on fatal admissions made by plaintiff's counsel in opening statements. *See Samuels v. Spangler*, 441 S.W.2d 129 (Ky. 1969) (granting directed verdict where plaintiff admitted defendant was not proximate cause of his injuries); *Caplinger v. Werner*, 311 S.W.2d 201, 203 (Ky. 1958) (approving directed verdict when plaintiff admittedly could not tie alleged negligence to his harm).

S.W.2d 84, 87 (Ky. 1966) (holding that in Kentucky truth is a complete defense to a libel action, even if the publication "may have been inspired by malice or ill will and be libelous per se").

The Court of Appeals was absolutely correct in this defamation action to address first the threshold issue of falsity. In so doing, the Court looked at the specific statements complained of and the evidence in the record relating to the truth or falsity of those statements. The Court properly concluded as a matter of law that certain of the statements were opinion, therefore incapable of being proved true or false. Based predominately on Flanagan's own admissions, the Court held that no reasonable jury could have found the remainder of the statements to be anything but "substantially if not precisely true."

There is absolutely no reason, "compelling" or otherwise, for this Supreme Court to exercise its discretionary authority to review this case. This issue as to whether Respondents' editorial page commentaries concerning the Petitioner's performance of his public duties were false and defamatory was straightforward and by no means precedent setting. The Court of Appeals' decision is consistent with, and relies upon, the existing state law and is supported wholeheartedly by the law set forth by this very Court. There simply is no legal or factual basis for this Court to exercise jurisdiction and grant Petitioner a third appellate review of this case.

## CONCLUSION

Respondents respectfully request that the Petition be denied.

Respectfully submitted,

JON L. FLEISCHAKER
Counsel of Record
DEBORAH H. PATTERSON
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

*Counsel for Respondents David J. Cazalet, Ed Cahill, and Russell County Newspapers, Inc., d/b/a The Times Journal*

# APPENDICES

## APPENDIX A

RENDERED: November 3, 1995; 10:00 a.m.
TO BE PUBLISHED

**COMMONWEALTH OF KENTUCKY**

**COURT OF APPEALS**

NO. 94-CA-001332-MR

DAVID J. CAZALET, ED CAHILL,
and RUSSELL COUNTY NEWSPAPERS,
INC., doing business as
THE TIMES JOURNAL — APPELLANTS

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
CIVIL ACTION NO. 93-CI-000076

V.

TERRIL FLANAGAN — APPELLEE

OPINION

REVERSING

** ** ** ** ** ** **

BEFORE: HOWERTON, HUDDLESTON and MILLER, Judges.

HUDDLESTON, JUDGE. Russell County Judge/Executive Terril Flanagan brought this defamation action against *The Times Journal* based on three editorials the newspaper published criticizing his position on controversial county issues. A Russell circuit court jury

returned a $1,000,000.00 verdict in Flanagan's favor. *The Times Journal*[1] appeals.[2]

Just as did the United States Supreme Court in the landmark First Amendment case, *New York Times v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686, 701 (1964), "we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." We have a duty to conduct "an independent examination of the whole record . . . to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.*, 376 U.S. at 285, 84 S.Ct. at 729, 11 L.Ed.2d at 709. *See also Restatement (Second) of Torts* § 580A cmt. g (1977). The Supreme Court of Kentucky has expressly recognized this unique standard of review for defamation cases. *Ball v. E.W. Scripps Co.*, Ky., 801 S.W.2d 684, 686, 689 (1990) (*citing New York Times*). When the question revolves around the underlying facts as opposed to the issue of actual malice, "appellate review still must be in terms of what the jury could find as the true facts and what the jury could reasonably infer from the testimony of witnesses when considered as a whole." *Id.* at 688 (*citing Harte-Hanks*

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[1] Collectively, Russell County Newspapers, Inc., David J. Cazalet and Ed Cahill represent the interest of the newspaper. Cazalet is the newspaper's editor and publisher. Cahill is its managing editor.

[2] The Kentucky Press Association, Inc., together with fifty-seven other newspapers, submitted an Amicus Curiae brief urging reversal of the judgment.

*Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989)).

Flanagan was Russell County Judge/Executive at the time in question and, therefore, a public official.[3] The following elements must be present to establish defamation of a public official: (1) A false[4] and defamatory[5]

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[3] Public officials are treated quite differently from private individuals in defamation cases. As the Supreme Court of Kentucky has stated, "[i]n the parlance of the horse industry, part of the turf of being a public official or public person is to be subject to public scrutiny." *McCall v. Courier-Journal and Louisville Times Co.*, Ky., 623 S.W.2d 882, 886 (1981). In 1966, the Court explained: "One who holds public office subjects his life to the closest scrutiny for the purpose of determining whether the rights of the public are safe in his hands." *Bell v. Courier-Journal and Louisville Times Co.*, Ky., 402 S.W.2d 84, 88 (1966).

[4] "One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true." *Restatement (Second) of Torts* § 581A (1977); *see also Bell*, 402 S.W.2d at 87 (indicating that truth is a complete defense to an action for libel in Kentucky). It is also clear that the publication need only be "substantially true." *Bell*, 402 S.W.2d at 87; *Pearce v. Courier-Journal & Louisville Times Co.*, Ky.App., 683 S.W.2d 633 (1985).

[5] "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Restatement (Second) of Torts* § 559 (1977); *see also Ball v. E.W. Scripps Co.*, Ky., 801 S.W.2d 684, 688 (1990). Furthermore, "[i]t is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct, and the function of the jury to determine whether that meaning was attributed to it by the recipient of the communication." *Restatement* § 566 cmt. c.

statement about the plaintiff;[6] (2) an unprivileged publication to a third party; (3) clear and convincing evidence of actual malice[7] on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the

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[6] "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory fact as the basis for the opinion." *Yancey v. Hamilton*, Ky., 786 S.W.2d 854, 857 (1989) (quoting *Restatement (Second) of Torts* § 566 (1977)). "A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is." *Restatement* § 566 cmt. c. This form of pure opinion is absolutely privileged. *Yancey*, 786 S.W.2d at 857.

[7] The United States Supreme Court has defined "actual malice" as the making of a statement with knowledge that the statement is false and defamatory or with reckless disregard for whether it is false or not. *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). *See also Warford v. Lexington Herald-Leader Co.*, Ky., 789 S.W.2d 758, 771 (1990); *McCall*, 623 S.W.2d at 885; *Restatement* § 580A. Flanagan states in his brief that the question of whether the newspaper had knowledge that the statements were false and defamatory is not before the court. Therefore, the only issue is whether *The Times Journal* acted in reckless disregard for the truth or falsity of the statements made in its editorials. "Reckless disregard" exists when there is "a high degree of awareness of . . . probable falseness" or there are "serious doubts as to [its] truth." *Restatement* § 580A cmt. d. "Actual malice" is used "with an esoteric rather than a literal meaning. Ill will or desire to injure the other party does not in itself have the effect of taking a communication outside the protection of the Constitution." *Id. See also Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125, 135 (1964).

publication.[8] It is also important to note that the plaintiff, Flanagan here, has the burden of proving the elements of the case as well as the burden of proving that the statements were outside the scope of constitutional protection with clear and convincing evidence.[9] *Restatement* § 580A cmt. f. To decide this case, it is necessary for us to apply the law of defamation to each editorial separately.

## MARCH 26, 1992 EDITORIAL: "A DO-IT-YOURSELF BUDGET"

The first editorial that Flanagan cites as a basis for his defamation action was published on March 26, 1992. It was published in response to public controversy over the

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[8] The distinction between "libel per se" and "libel per quod" was explained in *E.W. Scripps Co. v. Cholmondelay*, Ky.App., 569 S.W.2d 700, 702 (1978):

> One interpretation of "per se" and "per quod" refers, respectively, to whether a defamatory statement is made on the face of the article, or whether extrinsic facts must be pleaded to explain that the statement is defamatory. If extrinsic facts must be supplied, then it is said innuendo must be pleaded, and the article is libelous per quod.

Flanagan must plead and prove special damages here because the editorials in question are, if anything, libel per quod. *See generally Shields v. Booles*, 238 Ky. 673, 38 S.W.2d 677, 681 (1931) (stating that "it cannot be said that voting for or against the repeal of a statute of itself raised an inference of libelous import").

[9] In *Hardin v. Savageau*, Ky., ___ S.W.2d ___, 1995 WL 561620, (1995), the Supreme Court held that the jury is to decide whether the "clear and convincing evidence" burden has been met. Because the *Hardin* rule applies prospectively, it is not relevant to this case.

county budget. Flanagan challenged the following statements:

> * County Judge-Executive Terril Flanagan has washed his hands of the county budget.
>
> * Flanagan has presented his proposal, which is at least $250,000 over being balanced, to the magistrates.

The Supreme Court of Kentucky has held that alleged defamatory matter must be considered as a whole. *McCall v. Courier-Journal and Louisville Times Co.*, Ky., 623 S.W.2d 882, 884 (1981). Specifically, "[t]he alleged defamatory words must be measured by their natural and probable effect on the mind of the average lay reader. . . . " *Id.* We cannot overlook the fact that this and the other editorials that Flanagan claims to be defamatory were published in the "Editorials and Comments" section of the newspaper under the conspicuous "In Our Opinion" heading. Considering that the "Editorials and Comments" section has traditionally served as a forum for opinions of the newspaper and citizens, the average lay reader would undoubtedly interpret the statements as the opinion of the author.

A statement of opinion is "actionable only if it implies the allegation of undisclosed defamatory fact as the basis for the opinion." *Yancey v. Hamilton*, Ky., 786 S.W.2d 854, 857 (1989) (quoting *Restatement* § 566). "A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is." *Restatement* § 566 cmt. c.

The statement alleging that Flanagan had "washed his hands" of the county budget is nothing more than a figurative phrase describing Flanagan's proposal. As recognized in *New York Times*, 376 U.S. at 271, 84 S.Ct. at 721, 11 L.Ed.2d at 701 (*quoting Cantwell v. Connecticut*, 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed.2d 1213, 1221 (1940)):

> To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to the enlightened opinion and right conduct on the part of the citizens of a democracy.

The opinions expressed in the March 26, 1992, editorial were based upon allegedly well-known disclosed facts regarding the terms of the proposed county budget. Considering the editorial context and the underlying facts, we believe that it was unreasonable for the jury to find that the statement was defamatory.

Flanagan further claims that the statement that the budget was "$250,000 over being balanced" was false. A statement of fact is not false if it is "substantially true." *Bell v. Courier-Journal and Louisville Times, Co., Ky.*, 402 S.W.2d 84, 87 (1966); *Pearce v. Courier-Journal & Louisville Times, Co.* Ky.App., 683 S.W.2d 633 (1985). *See also Restatement* § 581A. Truth is a complete defense to defamation claims in Kentucky. *Bell*, 402 S.W.2d at 87. Considering that Flanagan admitted that the budget he submitted projected expenditures of $250,000.00 for which there was

no corresponding source of income, it is apparent that the statement complained of was substantially true.

Truth and falsity aside, however, we must point out that these statements are simply not defamatory. The newspaper's criticism of Flanagan's budget proposal cannot be said to harm the public official's reputation in a way that would lower him in the estimation of the community or to deter others from associating with him. *Restatement* § 559. As the United States Supreme Court has said, "[i]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. . . . " *New York Times*, 376 U.S. at 269, 84 S.Ct. at 720, 11 L.Ed.2d at 700 (*quoting Bridges v. California*, 314 U.S. 252, 270, 62 S.Ct. 190, 197, 86 L.Ed. 192, 207 (1941)). Some even consider this type of public discourse to be a political duty. *Id.* The constitutional guarantees of free speech and press[10] require us to reverse the finding of defamation concerning the March 26, 1992, editorial.

## DECEMBER 17, 1992 EDITORIAL: "QUESTIONS FOR THE FISCAL COURT"

Flanagan challenges the following question asked in the December 17, 1992, editorial: "How could Herlen Lawless, Brad Redmon, Randall Hopper and Flanagan vote to spend $50,000 when no one even seemed to know from whom they were buying the insurance or what they were buying?" Flanagan claims that this question implies false facts. First, Flanagan says that he did not actually

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[10] U.S. Const. amend. I; Ky. Const. §§ 1 and 8.

vote on the issue. Second, Flanagan claims that the issue voted on was whether to buy insurance, not whether to spend $50,000.00.

Although Flanagan did not actually vote on the insurance issue, the statement was not completely false[11] to say that he did when he brought the issue before the fiscal court, supported the purchase and admits that he would have voted in favor of the purchase had he voted. Flanagan testified that it was his practice to count the votes of the four other members of the fiscal court before voting himself. Since the vote on this issue was three-to-one without Flanagan's vote, Flanagan decided that it was unnecessary for him to vote. Flanagan's vote, either for or against the purchase, would not have changed the outcome. Flanagan also testified that, as the presiding member of the fiscal court, it was his practice to count a person who does not cast a vote on an issue with the majority. By virtue of his own practice, Flanagan cannot escape being counted with the majority by refusing to vote on controversial issues. Accordingly, the statement was substantially if not precisely true.

Flanagan's claim that the vote was merely on whether to purchase insurance, not whether to spend $50,000.00, also lacks complete falsity considering that another member of the fiscal court reported the $50,000.00 price to the press. We will not label a statement as false based upon such minor inaccuracies in the

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[11] *See Restatement* § 581A cmt. f ("slight inaccuracies of expression are immaterial" if the statement is "true in substance.").

rephrasing of the actual vote. Again, the statement was substantially true.

Regardless of truth or falsity, there is nothing defamatory about saying that a public official supported the purchase of health insurance for county employees.[12] The record simply fails to support a finding of defamation. Therefore, we must reverse the finding that the December 17, 1992, editorial was false and defamatory.

## FEBRUARY 25, 1993 EDITORIAL: "MONTHLY SURCHARGE IS THE BEST WAY TO FUND DISPATCH AND 911"

The final basis for Flanagan's defamation claim is found in a February 25, 1993, editorial. Considering that Flanagan has admitted the truth of the statements contained therein,[13] we need not consider this editorial further. Truth is a complete defense to defamation claims in Kentucky. *Bell*, 402 S.W.2d at 87. Furthermore, we cannot ignore the fact that when Flanagan became Judge/Executive, he became a public official. By serving as a public

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[12] "If the only question is whether the language is capable of bearing a particular meaning and whether that meaning is defamatory or not, that question is one of law. . . . " *Restatement* § 580A cmt. d. While it is true that the issue of whether the defendant acted with knowledge or in reckless disregard of falsity is usually one of fact to be decided by a jury, the present case turns on the issue of whether there was a false and defamatory statement at all.

[13] Flanagan testified: "Well, I don't deny making the statement. But, once again, the courthouse is full of people, three-hour meeting, I had a 30-second spot. And who makes the editorial page? Old Terril again. . . . "

official, Flanagan subjected "his life to the closest scrutiny for the purpose of determining whether the rights of the public are safe in his hands." *Id.* at 88. We reiterate:

> There is a well-known expression applied to those in public office, "If you can't stand the heat, you'd better stay out of the kitchen." Confrontation has a salutary effect and causes those in positions of public responsibility to practice thoughtfulness and wisdom in their utterances and carefully weigh their decisions. *Record-Times, Inc. v. Town of Wheatland*, 650 P.2d 297, 301 (Wyo. 1982).

The record in this case fails to support the jury's finding that the three editorials cited as the bases for Flanagan's defamation claim contain false and defamatory statements. Considering that we have found that the first element of a valid defamation claim is not satisfied, it is unnecessary for us to consider whether Flanagan successfully proved the additional elements of a defamation case.[14] Nevertheless, we entertain serious doubt as to whether Flanagan established either actual malice or special damages. Actual malice does not exist unless the "defendant . . . entertained serious doubts as to the truth of his publication." *E.W. Scripps Co. v. Cholmondelay*, Ky.App., 569 S.W.2d 700, 704 (1978). In addition to the newspaper's managing editor's testimony that he believed the editorials to be true, Flanagan admitted the absence of actual malice in his opening statement.[15]

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[14] The elements are set forth at the beginning of this opinion.

[15] Flanagan's attorney said: "*The Times Journal* evidently thought that all these things were true that they had said."

There is also a lack of evidentiary support for a finding of special damages. Proof of special damages requires evidence of actual economic loss. *Columbia Sussex Corp., Inc. v. Hay*, Ky.App., 627 S.W.2d 270, 274 (1981). Proof of mental anguish[16] and a lost election,[17] the only harm Flanagan claims to have suffered, is not sufficient to establish special damages.

Since we reverse the judgment in favor of Flanagan, it is unnecessary that we consider other issues raised by the newspaper, including its claim that punitive damages were improper under Ky. Rev. Stat. (KRS) 411.051.

The judgment is reversed.

ALL CONCUR.

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[16] *Rich v. Kentucky Country Day, Inc.*, Ky.App., 793 S.W.2d 832, 837 (1990) (special damages require more than "just mental pain, humiliation, disgrace or mortification").

[17] *Taylor v. Moseley*, 170 Ky. 592, 186 S.W. 634, 637 (1916) (special damages cannot be based upon an unfavorable election result).

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Jon L. Fleischaker
WYATT, TARRANT & COMBS
Louisville, Kentucky

ON BRIEF:

Deborah H. Patterson

BRIEF FOR AMICI:

Michael L. Judy
James L. Thomerson
STOLL, KEENON & PARK
Lexington, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Robert L. Bertram
BERTRAM & WILSON
Jamestown, Kentucky

# Editorials and Comments

## In Our Opinion

## A do-it-yourself budget

County Judge-Executive Terril Flanagan has washed his hands of the county budget.

Flanagan has presented his proposal, which is at least $250,000 over being balanced, to the magistrates.

The county judge-executive, who could find the needed savings in the budget if he wanted to, has left it to the four county magistrates to balance the county budget.

He has placed the magistrates in the unenviable position of either making the difficult decisions about who and what to cut out of the county budget or raising taxes.

The magistrates, who may not be familiar enough with the day-to-day operations of the county government to squeeze out the fat, have been given over to the potentially unhappy crowd of government agencies and employees seeking county tax dollars.

When push comes to shove, we suspect the magistrates may find it easier to raise taxes than to face cutting employees.

Flanagan knows that without his help, it will be very difficult for the magistrates to decipher the budget and he's not going to help.

Basically, he's turned his back on the magistrates again because they wouldn't do what he wanted them to do.

He's said to them, "do it yourself."

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APPENDIX B

# Editorials and Comments

## In Our Opinion

# Questions for the fiscal court

We don't disagree with the need of Russell County employees for health insurance, but...

Where is the money to pay for the insurance going to come from?

How could County Judge-Executive Terril Flanagan tell the magistrates the money was available after insisting for more than three years that the county did not have enough money to operate?

Why weren't the details of this insurance proposal presented at a fiscal court meeting so the public would know what was being proposed?

- How could Herlen Lawless, Brad Redmon, Randall Hopper and Flanagan vote to spend $50,000 when no one even seemed to know from whom they were buying the insurance or what they were buying?
- Is $150 per employee per month a good rate?
- What kind of coverage are we buying for county employees?
- Is it just health insurance?
- Does it include dental, life and disability insurance?
- Can the taxpayers afford all of that?
- Why didn't the county take bids for this insurance so rates could be compared?
- Was this decision made behind closed doors and then rubber stamped without any real discussion in public?
- Does this mean that the one-quarter percent payroll tax which the magistrates passed this year with a sunset clause will not be allowed to expire, but will have to continue and probably be increased?
- Why do Russell Countians allow the fiscal court to act without demanding that all these important questions be answered in public before their hard-earned tax dollars are spent?

APPENDIX C

# In Our Opinion





## Monthly surcharge is the best way to fund dispatch and 911

It was encouraging Tuesday night to watch as elected officials from Jamestown, Russell Springs and Russell County met in a special joint session to discuss solving the county's emergency dispatch problem.

The key to better, or more efficient, government in Russell County lies in cooperation between these three units of government.

However, the meeting pointed up once again our concern about Russell County Judge-Executive Terril Flanagan, his attitude toward taxing people, and his leadership of county government.

During a general discussion of whether to support the cost of providing emergency dispatch and emergency 911 telephone service in Russell County with a $1 monthly surcharge on each telephone customer, Flanagan told the assembly that he could "name you a dozen" other ways to pay for the system.

Russell Springs City Councilwomen Rose Tarter, serving as mayor pro tem in the absence of Russell Springs Mayor Kuthbert Eastham, asked the question we were just dying to ask.

"Such as?" she asked.

After a rather long stretch of silence, all Flanagan could come up with was the occupational payroll tax.

Remember taxpayers, the payroll tax is set to expire in July unless the county judge-executive and the magistrates vote it in again.

Apparently, Flanagan is in favor of keeping the payroll tax in effect beyond its first birthday.

Flanagan's suggestion that the dispatch service be funded by the occupational payroll tax shows that he has already begun an attempt to justify renewing the occupational payroll tax.

By using an issue as popular as 911, he may try not only to renew the tax, but to increase it from a quarter percent to a half percent or more.

The Times Journal opposes that idea because the payroll tax would raise much more than is needed to fund emergency dispatch and that would leave extra money for the county to spend and, perhaps, waste.

Proceeds from an occupational payroll tax are what are called "discretionary" funds, which means that they can be used for just about any purpose the fiscal court wants, from paving roads to paying cellular telephone bills.

However, a $1 surcharge on your monthly telephone bill would have to be used to provide emergency dispatch service with 911. The fiscal court would not have any discretion over how to spend the proceeds from a surcharge.

A monthly $1 surcharge on telephone customers, which is designated to pay for emergency dispatch, is a much wiser plan and much easier on the county's already over-burdened taxpayers.

It would assure the people of Russell County that their money will be used specifically for the purpose for which it was intended.

Supreme Court, U.S.
FILED
OCT 28 1996
OFFICE OF THE CLERK

No. 96-399

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1996

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TERRIL FLANAGAN, - - - - - *Petitioner*

*versus*

DAVID J. CAZALET,
ED CAHILL, and
RUSSELL COUNTY NEWSPAPERS,
INC., d/b/a *The Times Journal*, - - *Respondents*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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## PETITIONER'S REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

---

ROBERT L. BERTRAM
BERTRAM & WILSON
One Monument Square
Jamestown, Kentucky 42629
(502) 343-3101
*Counsel for Petitioner*

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

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8 pp

## QUESTION PRESENTED FOR REVIEW

Whether a reviewing court may limit the number of findings that a jury reached in their determination of constitutional malice in a public figure defamation case.

## PARTIES TO THE PROCEEDING

All the parties to the within proceeding before the Court whose judgment is sought to be reviewed are named in the caption to the Petition as filed in this Court.

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RUSSELL COUNTY NEWSPAPERS,
INC., d/b/a *The Times-Journal*, - - - *Respondents*

---

## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Petitioner, Terril Flanagan, respectfully submits this Reply to Respondents' Brief in Opposition to Petitioner's Petition for Writ of Certiorari seeking review of the November 3, 1995 Opinion Reversing rendered by the Kentucky Court of Appeals.

### OPINIONS BELOW

The Opinion Reversing of the Court of Appeals, which was the highest court to actually review and decide the case, has been previously attached to the Petition herein.

### JURISDICTION

This Court has proper jurisdiction over the case as set out previously in the Petition herein.

## STATEMENT OF THE CASE

Regardless of the Respondents' attempts to obfuscate the facts of the case, a review of the actual Transcript for Trial speaks for itself in showing clearly that the petitioner was not merely the target of a "negative press" campaign, but also was the subject of Respondents' false and defamatory statements, printed under the guise of "opinion" or "editorial". The Jury was justified in its award of damages to the Petitioner, and the heart of this Petition goes to the Court of Appeals' clearly erroneous substitution of its own interpretation of Respondents' articles for those of the Jury. It should be kept in mind that Petitioner was the target of almost weekly articles (in a newspaper published weekly) and that the intent of the Respondents was to "get" the Petitioner – that is, to bring about his political demise. The Petitioner does not contend that the Respondents have no right to do so; however, the Respondents have no right to do so by printing lies about the Petitioner in order to achieve their goal.

The Court of Appeals found the Respondents' "editorials" to be either, substantially true, or protected opinion, but these findings, not the findings of the Jury, clearly go against the weight of the evidence. If the Petitioner submitted a balanced budget to the County Fiscal Court (as he was legally required to do), how can it be "substantially true" that he "washed his hands of the budget"? If the Petitioner directed the County Magistrates to perform their elected responsibility to work out the where-with-all to raise funds for the county financial needs, how is it "substantially true" or "protected opinion" that he "turned his back on the magistrates"? Obviously, all these statements are taken completely out of context, and that was one of the Court of Appeals' biggest errors – not viewing the statements in context and looking at the circumstances surrounding them. If they had done so, the Court of Appeals would have seen what the Jury saw, a series of false state-

ments put forth as facts, not opinions, about the Petitioner designed to malign, deprecate, and embarrass him.

Similarly, the article regarding the Petitioner's "vote" on buying health insurance for county employees was totally false. The Petitioner never voted on the issue, and the Respondents' quoted price of fifty-thousand dollars never came up at the meeting in question, nor did it originate from the Petitioner. Regardless of how the Respondents try to piece together some type of convoluted logic to justify this purely defamatory statement (again, taken in the context of an article attempting to malign the Petitioner as a wastrel of public funds and an idiot that lives in a vacuum), there is no other reasonable conclusion to be reached, either by a Jury or by the Court of Appeals, than that this statement was false.

## REASONS FOR GRANTING THE PETITION

The Court of Appeals never made it past the very first step in the appellate review process. It prematurely, and erroneously, shut down its review of the case, and held, again erroneously, as a matter of law, that the Petitioner had no cause of action. Although the Court of Appeals framed its review as what a jury could find as the truth herein, it went on to totally substitute its own opinion as to what the truth was, as opposed to considering what a jury reasonably could find. There is no constitutional basis for this blatant usurpation of the Jury's role and none of the case law cited by Respondents is controlling on the issue. Indeed *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989) controls on this question, and has been followed in Kentucky; the Court of Appeals even begins its opinion with, presumably, this analysis in mind, and then goes on to completely ignore it. Significantly, the Respondents fail to address *Harte-Hanks*, Id., at all in their Response Brief in Opposition herein. Similarly, *Milkovich* v. *Lorain Journal Company*, 497 U.S. 1

(1990) rejected the defense that language denominated as "opinion" by the publisher is not actionable. The reviewing court must find whether the "opinion" implies facts provable as false; the threshold question is not merely is the language fact or opinion. Thus, the question of defamation is one for the jury to decide.

The Court of Appeals failed to apply the appropriate standard of appellate review and analysis to be applied herein. This Court should grant the Petitioner's Writ so that a clear statement on this issue may be generated.

## CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. BERTRAM
BERTRAM & WILSON
One Monument Square
Jamestown, Kentucky 42629
(502) 343-3101
*Counsel for Petitioner*